U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10406687

Date: SEPT. 24, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a water polo coach, seeks classification as an individual of extraordinary ability. This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, and we subsequently dismissed the appeal.[1] The matter is now before us on a combined motion to reconsider and motion to reopen.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will deny the motions.

I. LAW

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if he or she is able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the individual's occupation.

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also*

[1] *See* In Re: 4992052 (Jan. 7, 2020).

Visinscaia v. Beers, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

Further, a motion to reconsider is based on an *incorrect application of law or policy*, and a motion to reopen is based on documentary evidence of *new facts*. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A. Judicial Proceeding Statement

The regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires the motion to be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceedings and, if so, the court, nature, date, and status or result of the proceeding." The Petitioner, however, did not include the required statement. Therefore, the Petitioner's motions do not meet the applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

B. Motion to Reconsider

At initial filing, the Petitioner claimed eligibility under six categories of evidence: awards under 8 C.F.R. § 204.5(h)(3)(i), memberships under 8 C.F.R. § 204.5(h)(3)(ii), published material under 8 C.F.R. § 204.5(h)(3)(iii), judging under 8 C.F.R. § 204.5(h)(3)(iv), leading or critical role under 8 C.F.R. § 204.5(h)(3)(viii), and high salary under 8 C.F.R. § 204.5(h)(3)(ix).[2] In response to the Director's request for evidence (RFE), the Petitioner maintained her eligibility for four criteria relating to memberships, judging, leading or critical role, and high salary. In addition, she claimed comparable evidence under the regulation at 8 C.F.R. § 204.5(h)(4). In denying the petition, the Director discussed the eligibility claims and evidence and determined that the Petitioner did not satisfy any of the criteria.

On appeal, as discussed in our decision, the Petitioner did not specifically identify any erroneous conclusion of law or statement of fact for the appeal. Instead, the Petitioner submitted additional documentation indicating eligibility under three criteria: awards, memberships, and high salary. In fact, the Petitioner provided an "Index of Tabs" without any brief or statement that challenged any of the Director's determinations.[3] Accordingly, we discussed the evidence relating to awards contained in the record, including the evidence provided on appeal, and determined that she did not demonstrate her eligibility for the awards criterion. Since the Petitioner only offered evidence relating to three criteria on appeal and provided no arguments relating to any other criteria, we concluded that we did

[2] The Petitioner's initial cover letter cited to 8 C.F.R. § 204.5(i), a classification for outstanding professors and researchers, for some of the criteria.

[3] The "Index of Tabs" on appeal reflects: "Tab 19 – The USCIS on December 26, 2018, Tab 120 [*sic*] – Support for the Criterion Membership in Association That Require Outstanding Achievements," "Tab 21 – Support of Criterion of Significantly High Remuneration for Services," and "Tab 22 – Nationally Recognized Award." The Petitioner's tabs from the initial filing and the RFE response were labeled Tab 1 – Tab 18.

not need to reach a decision on the membership and published material criteria as she could not meet at least three criteria. As such, we reserved determinations on those issues.[4]

On motion, the Petitioner argues that we "analyzed one criterion (Awards)" and "erroneously concluded that [the] Petitioner only relied on two more criteria – Membership and High Salary" and "failed the *de novo* review standard by not looking at all criteria claimed by [the] Petitioner." We exercise *de novo* review of all issues of fact, law, policy, and discretion. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). This means that we look at the record anew and are not required to defer to findings made in the initial decision. Furthermore, our decision may address new issues that were not raised or resolved in the prior decision. However, the Petitioner has not demonstrated that our *de novo* review authority also requires us to evaluate and address all previous eligibility claims or other prior arguments that were not raised or not contested on appeal.

Moreover, the Petitioner contends that she "never waive[d] any of her claims." However, the Petitioner waived those claims when she did not assert them on appeal. *See Getty Oil Co. v. Andrus,* 607 F.2d 253, 255–56 (9th Cir.1979) (the court concluded that the law does not require the plaintiff to affirmatively waive claims; instead, he waives claims if he fails to assert them on appeal). Further, we generally do not address issues that are not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be waived. *See, e.g.*, *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court determined the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

For the reasons discussed above, the Petitioner did not establish that we erroneously applied law or policy. Accordingly, we will dismiss her motion to reconsider.

C. Motion to Reopen

The Petitioner submits photographic copies of a plaque and monument and claims the evidence shows her eligibility under the awards criterion and as comparable evidence. Under the Petitioner's "Index," she asserts, "Tab 24 – Evidence of Monument and Plate in the city of [redacted] placed in 2019 for raising status of [redacted] internationally and significant contribution in development of physical education and sport in the country (achieved prior to filing underlying Form I-140 petition)." She filed the petition on December 29, 2017, and the plaque indicates [redacted] 2019." Here, the evidence does not support her assertion that she received the award prior to the filing of the petition. The Petitioner must establish eligibility at the time of filing the benefit request. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Regardless, the plaque reflects issuance from the [redacted]' and signed by the mayor of [redacted] The Petitioner did not establish that this local or regional award represents a nationally or internationally recognized award for excellence in the field. She did not provide supporting evidence showing the significance or recognition of the award in the field. In addition, as the Petitioner waived her claim of comparable evidence on appeal, we will not address it on motion.

[4] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).

The documentation submitted on motion does not demonstrate that she meets the awards criterion, as well as at least three evidentiary criteria. Accordingly, we will deny her motion to reopen.

III. CONCLUSION

The Petitioner has not shown that we incorrectly applied law or policy in our previous decision based on the record before us, nor does her new evidence on motion establish that she meets at least three criteria.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.